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No Lawsuit Left Behind

Chief Justice Roberts, the Schoolmaster?

BY MICHAEL HEISE

From the perspective of newspaper headlines, judicial activity on the education front was uncharacteristically unspectacular last year. Unlike blockbuster cases in the recent past, ranging from publicly funded vouchers (*Zelman v. Simmons-Harris*, 2002) to affirmative action (*Grutter v. Bollinger* and *Gratz v. Bollinger*, 2003) and religion (*Locke v. Davey*, 2004), the Supreme Court last term said little of significance about education.

Below the high court, however, was a veritable ant farm of judicial activity concerning our schools. This legal trench warfare involves critical issues that may give Chief Justice John Roberts plenty to do for years to come. Most of the action centered on the unsexy but significant question of the allocation of authority in education policymaking. A growing number of nasty fights between and among federal, state, and local officials about how to manage education resources emerged, and include two notable cases: *Pontiac v. Spellings* and *Connecticut v. Spellings*.

These cases, and much other intergovernmental jockeying, derive from resentment generated by No Child Left Behind (NCLB). The historic law dramatically increased the federal government's influence in K–12 education policy, and hostility toward the law has been percolating for some time. The transition from hostility to federal education policy to formal litigation should surprise no one.

What was not anticipated, however, was the federal law's influence on litigation concerning the adequacy of school financing. Thus the National Education Association and the several public-school districts in Michigan that sued the Department of Education last April in *Pontiac v. Spellings*, asserted that NCLB is an unfunded mandate and, for relief, sought the ability to use federal education funds as they saw fit. Similarly, last August the state of Connecticut sued the federal government (*Connecticut v. Spellings*) on the grounds of unfunded mandate and for perceived "inflexibility" regarding the state's numerous NCLB waiver applications.

Though both lawsuits will probably fail in the courts (see "NEA Sues over NCLB," *legal beat*, Fall 2005), they are already having a political effect on the way that education funds are obtained and distributed. And they may already be more effective in diluting NCLB requirements than an army of Capitol Hill lobbyists has been. In an effort to buy some

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political peace, or perhaps in response to the litigation, Education Secretary Margaret Spellings recently announced additional "flexibility" and a "common-sense" approach for states' regulatory compliance with NCLB. It is too early to tell whether the DOE's modified approach will fuel even more state foot dragging, but the winds of compromise are blowing.

It will also be worth watching how NCLB affects other litigation concerning school finance. Although state and local

district feuds over school funding persist, these disagreements are increasingly cast in a way to implicate the 2002 federal law. The Supreme Court's *Rodriguez* decision in 1973 may have insulated the federal government from any direct constitutional liability flowing from per-pupil spending gaps within a state, but many school-finance activists view NCLB as creating a federal statutory avenue for helping to transform failure in the classroom into success in the courtroom. Any legal success, however, comes out of state coffers, not the U.S. Treasury. The dynamic of a federal law's generating increased financial exposure for state lawmakers helps explain why some states, such as Louisiana, Colorado, and Connecticut, are lowering student achievement standards—and taking proactive measures in court.

Viewed in isolation, these issues—NCLB litigation, the U.S. Department of Education's tinkering with NCLB compliance, and school-finance litigation—may not suggest anything out of the ordinary. Viewed collectively, however, the thread that binds all three is NCLB and, more important, how the act restructures K–12 education federalism. Fights over K–12 policymaking now loom even larger on the horizon and increasingly threaten to exacerbate an already litigious education culture. Roberts, long thought to be a states' rights advocate, may be forced to rethink such matters.

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